82-1699
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

OAKLAND SCAVENGER COMPANY,
Petitioner,

VS.

JOAQUIN MORELES BONILLA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the shareholders of Oakland Scavenger Company and other family-owned or closely-held businesses organized as corporations violate Title VII of the Civil Rights Act of 1964 or Title 42 U.S.C. Section 1981 if they reserve for themselves the most attractive and highest-paying positions and restrict the transfer of shares to the children of retiring or deceased shareholders, where all shareholders are persons of Italian ancestry.

Whether the shareholders of Oakland Scavenger Company and other family-owned or closely-held businesses organized as corporations have a constitutional right to reserve for themselves the most attractive and highest-paying positions and restrict the transfer of shares to the children of retiring or deceased shareholders, where the shareholders are all persons of a single racial or ethnic group.

Whether Title 42 U.S.C. § 1981 prohibits discrimination in the selection of corporate business partners in wholly private transactions not advertised or offered publicly, where only children of retiring or deceased shareholders are permitted to buy stock and all shareholders are persons of Italian ancestry.

Whether the court of appeals' remand for trial of a claim for relief under Title 42 U.S.C. § 1981 according to a disparate impact test is correct in view of this court's determination in *General Building Contractors Association, Inc. v. Pennsylvania,* ..... U.S. ..... 73 L.Ed.2d 835 (June 25, 1982) that proof of discriminatory intent is required.

Whether it was error for the court of appeals to reverse the dismissal of the district court under Rule 12(b)(6), Fed.R.Civ.Proc., for considering documents outside the pleadings, where the motion to dismiss was joined with a motion for summary judgment under Rule 56 and both courts referred to those documents in their opinions.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Oakland Scavenger Company (Petitioner)
Joaquin Moreles Bonilla (Respondent)
Armando Cardenas (Respondent)
Enrique Cardenas (Respondent)
Heliodoro Cardenas (Respondent)
Benjamin Ceja (Respondent)
Jose Guzman (Respondent)
Jose Lopez (Respondent)
Luis Magallon (Respondent)
Octavio Marquez (Respondent)
Raul Mendez (Respondent)
Gilberto Palafox (Respondent)
Joel Pinedo (Respondent)
Felix R. Sanchez (Respondent)
Jesus Sanchez (Respondent)
Curtis Stredic (Respondent)
Jose Torres (Respondent)
International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Local 70

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Petitioner Oakland Scavenger Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 9, 1982, and amended February 17, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Bonilla v. Oakland Scavenger Company* (9th Cir. 1982) 697 F.2d 1297 and is reproduced, as amended, in Appendix A. The order denying the petition for rehearing and amending the opinion is reproduced in Appendix B. The opinion of the District Court dismissing the complaint for want of jurisdiction is reproduced in Appendix C. The judgment of the District Court to reproduced as Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on November 9, 1982, and amended on February 17, 1983. A timely petition for rehearing and suggestion of rehearing en banc was denied on February 17, 1983, and this petition for writ of certiorari was filed within ninety days of that date. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

RELATED CASE

Hishon v. King & Spaulding (U.S. Supreme Court Docket No. 82-940, cert. granted January 24, 1983) 51 U.S.L.W. 3552 is a case involving closely-related issues.

PROVISIONS OF LAW INVOLVED

This case involves Amendment 5 of the Constitution for the United States of America; Title 42 U.S.C. § 1981, R.S. § 1977; § 703, Title VII, of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-2); and Rule 12(b), Federal Rules of Civil Procedure, the pertinent provisions of which are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner Oakland Scavenger Company[1] is a waste collection and disposal company incorporated in 1920 by immigrants from Northern Italy as a business cooperative and protective association. From its inception every owner was required to work full-time for the company. Ownership has passed in most cases from generation to generation within the same families.

Respondents are current or former Spanish-surnamed or black employees of Oakland Scavenger Company. They complained that the shareholders reserved for themselves certain driver positions and paid themselves better wages than nonshareholders. Because there were no Spanish-surnamed or black shareholders, these employees claimed that this practice unlawfully denied them employment opportunities in violation of Title VII of the Civil Rights Act of 1964 and Title 42 U.S.C. § 1981.

Respondents also claimed that rules in the company bylaws restricting the transfer of shares to children of deceased or retiring shareholders unlawfully denied them, on grounds of race or national origin, the opportunity to share in the employment benefits arising out of ownership.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 70, was named as an additional defendant. Respondents claimed that Local 70 acquiesced or participated in these practices by permitting in its collective bargaining agreement a right of preferential assignment for shareholders to certain driver positions, breaching its duty of fair representation. Local 70 did not participate in the appeal to the Circuit Court.

The original partners ran independent scavenger businesses from a horse and wagon, collecting trash and separating out rags, bottles and other recyclables. In the early part of this century, garbage collection in the San Fran-

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[1]Oakland Scavenger Company has no parent companies, subsidiaries or affiliates. Rule 28.1, Rules of the Supreme Court.

cisco Bay Area was done almost exclusively by dozens of small operators, most of Genoese extraction, who competed on every street for customers. See Perry, *San Francisco Scavengers, Dirty Work and Pride of Ownership,* (University of California Press 1978), pp 15-19, 218-219. In December 1909, to put some order into the collection system through consolidation of routes, and "to better the social and individual condition of our members through union and mutual protection in our trade," the Oakland scavengers pooled their assets into their first cooperative association, the Oakland Scavengers Association. The current corporation was formed in 1920 as a successor organization.

Even before consolidation, these businesses were organized along family lines, with sons working alongside their fathers and other relatives. There were no outside investors in Oakland Scavenger Company; every shareholder worked, three or four to a wagon. From 1920 to 1943, the company expanded until it had 208 shareholders, each holding an equal block of 100 shares.

World War II forced a change in the company's organization. Many of the shareholders enlisted or were drafted into the armed forces, creating a manpower shortage. To fill vacancies, it was necessary to hire people who became known as "helpers" from outside the families of the owners. In the ensuing years, the company continued to grow and its workforce expanded to nearly 700, including owners, so that even with the return of shareholders at the end of the war the hiring of "helpers" became a permanent feature. No more shares were issued after 1943.

A resolution restricting the transfer of shares was approved in 1930, and later incorporated into the bylaws. The resolution stated that it was particularly important that every shareholder should enjoy the respect and confidence of all other shareholders. To insure that stock did not come into the hands of persons not acceptable to the shareholders, each agreed to certain limitations. A shareholder could sell his shares only to a person approved by the board

of directors. After his death or retirement, if there was a son or male relative whom the board judged to be competent, suitable and acceptable to take the shareholder's place, the board was authorized to issue a new certificate to the son or male relative. See *Perata v. Oakland Scavenger Company*, 111 C.A.2d 378, 382, 244 P.2d 940 (1952); *Oakland Scavenger Company v. Gandi*, 51 C.A.2d 69 (1942).

If there was no suitable son or male relative to replace a retiring or deceased shareholder, the board of directors had authority under the resolution and later the bylaws to sell the shares to a person who, in its opinion, was "competent, suitable and acceptable to take [the shareholder's] place in the corporation." Shares were never sold to the general public. Prospective buyers were employees who were relatives or close friends of shareholders who learned by word of mouth that shares had become available. Ownership continued to be held by persons of Italian ancestry, though only about one-half of the company's Italian-surnamed collection employees are shareholders.

At any time within a two-year probationary period, the board could terminate the transferee's status and acquire the stock for the company treasury. A shareholder could withdraw, but only if he first found an acceptable replacement. If a shareholder was absent from his employment more than 30 days without consent of the board, he could be fined, have his employment terminated, and be forced to forfeit has right to receive dividends. He had to pay for lost tools and damage to equipment or other property. He was also subject to fines or suspension if he failed to report for or carry out his work or the orders of the board, failed to attend all monthly shareholders' meetings, or was otherwise found guilty of misconduct by a jury of shareholders.

Despite the corporate form, the shareholders continued to think of themselves as partners. The compensation of shareholders was originally arrived at by dividing the proceeds at the end of each month after payment of expenses, each receiving an equal amount, less deductions at a fixed rate per day for working days missed. By the early 1940's,

shareholders were paid a monthly "basic rate" with deductions for days missed, while helpers received a daily wage. Anything left was divided among the shareholders.

In 1967, the helpers were organized by Teamsters Local 70. The owners joined the union in order to protect their right to work on the routes under the collective bargaining agreement. But in negotiating a contract, they reserved the right to assign shareholders to head driver positions on collection routes vacated by other shareholders, preserving those jobs for the owners until none was available and the job had to be filled by seniority bid. The "right of assignment" applied only to routes where two or more employees worked, which excluded single-operator collection trucks and, more recently, tractor-trailer units used as transfer trucks. Management positions were not affected by the contract and continued to be held by shareholders.

From 1967, all of the openings in the Teamster bargaining unit were filled by seniority bid based upon original date of hire, except where the shareholder "right of assignment" was exercised for head route driver positions. The Ninth Circuit found that under the seniority system, "The jobs not filled with shareholder-employees by the right of assignment went to the senior qualified bidder among the other employees." 697 F.2d at 1300.

In the late 1960's, the number of shareholders declined as the company began to retire shares. After May 1968, all share transfers were to sons, one son-in-law, or to the company itself. In 1972, the company installed a formal policy of retiring all shares where there was no son to purchase them. The bylaws were amended in 1978 to permit transfer of shares to daughters as well. The number of owners decreased to approximately 135, who now occupy management positions and one-half of the head route driver positions, as well as a number of other driver jobs acquired through seniority bid.

Originally, shareholders handled all of the business on their routes, acquiring new accounts, collecting service charges, responding to complaints, and recording and

accounting for monies received as well as assuming responsibility for care of the equipment. The increasing size of the business brought about centralized billing, but shareholders on collection routes were still expected to answer for and correct customer complaints, collect delinquent service charges, supervise their crews, schedule any special collections, and see to the advancement of the company's business.

All employees within the Teamster bargaining unit were paid according to the contract scale after 1967, except owners who, with a few exceptions, received a premium hourly rate and were assured one and one-half hours of overtime each day.[2]

The complaint was filed on January 10, 1975, by five Spanish-surnamed or black employees who settled individually and were dismissed on April 2, 1980. Their complaint vaguely alleged discrimination in general, but particularly challenged the shareholder preference represented by the right of assignment, premium pay and the stock transfer restrictions. They requested relief for themselves and a class of persons "similarly situated." On June 16, 1980, the sixteen respondents sought leave to intervene on their own behalf and on behalf of the alleged, but not yet certified, class.

Petitioner opposed intervention and subsequently noticed a hearing on motions to dismiss pursuant to Rule 12(b)(6) and for summary judgment pursuant to Rule 56, Fed.R.Civ.Proc. Petitioner asserted that neither Title 42 U.S.C. Section 1981 or Title VII of the Civil Rights Act of 1964 applied to the private, unadvertised sale of corporate stock; that the court had no jurisdiction under Title VII or Section 1981 to regulate the compensation or assignment of owners, even where they were technically employees of the corporation, and that shareholders

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[2]This action is concerned only with employees in the bargaining unit represented by Teamsters Local 70. Other employees, represented by East Bay Automotive Machinists, Lodge No. 1546, or Warehouse Union No. 6 were not included in the alleged class.

enjoyed a proprietary right, protected under the Fifth Amendment of the Constitution, to control their own job selection and compensation without unreasonable interference by government. Petitioner also claimed that Section 1981 applied only to discrimination on the basis of race and not where family relationship limited the class of persons who were eligible to purchase shares.

Petitioner submitted in support of those motions deposition transcripts, affidavits and detailed schedules of all share transfers and bid awards. The district court, while relying upon the supporting documentation, referred only to the motion to dismiss in its opinion.

The district court stated in pertinent part:

> Plaintiffs have failed to state a claim that is cognizable under Section 1981 or Title VII. . . . Section 1981 prohibits racial discrimination in the making and enforcement of contracts. Plaintiffs have alleged that they were excluded from ownership of Oakland Scavenger Company stock on the basis of race and national origin in violation of their right to make and enforce contracts in the same manner which is enjoyed by white citizens generally. While it is clear that Section 1981 extends to private conduct as well as State action, *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-561 (1975), the Supreme Court has limited its application in at least one significant respect. It is not applicable to "truly private" organizations, where there is a "plan or purpose of exclusiveness" other than race. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 299, 237 (1969). In the instant case all sales of stock during the applicable period of limitations were to sons, and in one case the son-in-law of existing stockholders, or to the Oakand Scavenger Company itself. . . . The stock was not advertised nor was it publicly offered in any way. Choices that are not part of a commercial rela-

tionship that is offered generally or widely were not intended to be within the scope of the Act. *Runyon v. McCrary*, 427 U.S. 160, 190 (1976).

Having established that on the facts presently before the Court Section 1981 does not prohibit the private unadvertised sale of Oakland Scavenger Company stock, it is apparent that plaintiffs have failed to state a claim under Title VII as well . . . . Plaintiffs have cited no authority, and apparently none exists, which would demonstrate that the shareholders of the Oakland Scavenger Company may not exercise their proprietary preference and reserve for themselves and their families the most attractive and highest paying positions. The right to hold specific private employment and to follow a specific private profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment of the United States Constitution. *Green* [*Greene*] *v. McElroy*, 360 U.S. 474, 492 (1959). Similarly, an individual cannot be precluded from pursuing any lawful occupation in a manner inconsistent with due process or the equal protection of the laws. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957). From this it follows that the stockholders of the Oakland Scavenger Company have the right to employ themselves and their families at whatever position and salary they can afford.

Judgment of dismissal was entered under Rule 12(b)(6) on the ground that the intervenors had failed to state a claim upon which relief could be granted.

Fifteen of the sixteen intervenors appealed. Notice of appeal was not filed on behalf of intervenor Jose Torres and he was not listed by respondents in their opening brief to the Ninth Circuit as a party interested in the outcome. The Ninth Circuit reversed and remanded.

The opinion was divided into two parts. The first part concerned respondents' allegations of discrimination in general. The Ninth Circuit acknowledged that petitioner

had filed a Rule 56(b) motion for summary judgment, but held that the district court improperly considered the deposition transcripts, affidavits and schedules while treating the motion as one to dismiss under Rule 12(b)(6). It found that respondents' allegations were sufficient under Title VII to defeat a Rule 12(b)(6) motion and ordered a trial. It did not discuss the Section 1981 claim, also dismissed by the district court, though the standards of proof, availability of jury trial, statute of limitations and available remedies are different. See generally, *Johnson v. Railway Express Agency*, 421 U.S. 454.

Part II of the opinion dealt with the proprietary preference and stock transfer limitations. As the district court had done in ruling on the motion to dismiss, and despite the ruling in Part I, the Ninth Circuit incorporated in its opinion many uncontradicted facts from documents submitted in support of the motion for summary judgment. It ruled that because the owners of Oakland Scavenger Company were all persons of Italian ancestry, the preference in assignment and compensation had a "disparate impact" on minorities. This it said was unlawful under Title VII unless the company could "demonstrate that legitimate and overriding business considerations provide justification." 697 F.2d at 1303. As for limiting the transfer of shares to family members, the Court said:

> "To meet this burden, the Company points to an allegedly superior interest in protecting and providing for members of the immediate families of the founders of the Company. But Title VII case law has from the beginning made clear that nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all."

The court then concluded:

> "We reject the Company's argument that its legitimate interest in protecting its family members overrides the countervailing national interest in eliminating employment discrimination based on race and national origin."

To bring the action within Title VII jurisdiction, the court first had to find that the shareholders preference constituted a condition of employment and not an attribute of ownership. Without saying how these might be distinguished, it simply stated, "The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment."

The circuit court appeared to be concerned by the precedent that would be established if such a large number of shareholders could continue to control the company's top positions. Saying that, ". . . our decision by no means interferes with the capacity of the proprietors of a small family-owned business, or, for that matter, any small business, to conduct its affairs with heightened solicitude toward family or friends," the court drew the line where Congress had fixed the jurisdictional standards for Title VII:

> In enacting Title VII, Congress specifically exempted employers with twenty-five or fewer employees from its coverage. Civil Rights Act of 1964, Pub.L.No. 88-352, 78 Stat. 253, Title VII, § 702(b) (codified as amended at 42 U.S.C. § 2000e(b)). In 1972 Congress amended the section to exclude from coverage employers with fifteen or fewer employees, Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103, § 2(2) (currently codified at 42 U.S.C. § 2000(e)(b)), though the House version of the bill had originally suggested an even lower threshold. See H.R.Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2155, 2161. The inclusion of this provision demonstrates Congress's due regard for the special concerns of smaller business. Here, however, we deal with an enterprise employing nearly 500 people. The "family" consists of more than 100 members and at one time included as many as 208. We will not dilute Title VII's imperative by altering the balance Congress has already struck.

The opinion did not mention petitioner's argument that the right to employ oneself or his family in his own business was among the "liberty" and "property" concepts of the Fifth Amendment, one of the grounds on which the action was dismissed in the district court. As in part I, the circuit court also failed to rule expressly on the Section 1981 claim. The district court's dismissal was reversed and the case remanded for a hearing on whether any other business justification existed for these practices. The claim against Teamster Local 70 was also reinstated.

REASONS FOR GRANTING THE WRIT

A. The issues are novel, have never been decided by this court, and are closely related to those in Hishon v. King & Spaulding

This case raises the question whether the laws prohibiting employment discrimination on account of race or national origin can be extended to regulate the selection of business partners and transfer of ownership interests, or limit the work and compensation of business owners. The issue is novel, has never been decided by this court, and is directly related to the issues in *Hishon v. King & Spaulding, supra,* in which this court granted a petition for writ of certiorari on January 24, 1983. In *Hishon,* the question is whether the selection of partners in a law firm is a promotional opportunity constituting a "term, condition or privilege of employment;" whether partners are employers or employees under the statute; and whether regulation of the selection process would impair protected associational rights. See *Hishon v. King & Spaulding* (11th Cir. 1982) 678 F.2d 1022, 1027-1028. The Eleventh Circuit ruled in *Hishon* that rather than being "an individual employed by an employer" according to the statutory definition in 42 U.S.C. Section 2000e(f), "the partners own the partnership; they are not its 'employees' under Title VII." 678 F.2d at 1028. Consequently, the selection of partners fell outside Title VII protection.

There was not a claim in *Hishon* under Section 1981; it was alleged that the plaintiff was denied selection to part-

nership on account of her sex, a classification not protected by that statute. *Runyon v. McCrary*, 427 U.S. 160 (1976). Whether Section 1981 would apply, according to the interpretation given by this court in *Runyon v. McCrary, supra*, and *Johnson v. Railway Express Agency, supra*, 421 U.S. 454, if a partnership were sued by an associate claiming discrimination on account of race, is one of the issues raised here.

This court is asked here to say what the law is with regard to freedom of choice in the selection of business partners, the work they perform and the compensation they receive on facts that have wider application than those in *Hishon*. Oakland Scavenger Company is a corporation, and despite its cooperative tradition of ownership, it cannot so clearly rely on the statutory definition of "employee" in Title VII to defeat the claim here. The company's owners are all "employees" of the corporation for many purposes recognized by the law. Consequently, this case goes to the heart of the question: What rights do owners of any business entity have after enactment of Title VII or Section 1981 to be employed or to employ their close family members in their own businesses; can ownership be limited to family members or close friends if to do so excludes any racial or ethnic group from participation in the employment benefits of ownership; and are there constitutional limits to Congress' authority to distribute employment opportunities when it interferes with the right of an individual to employ himself or members of his family in his business?

This court decided in *Runyon v. McCrary, supra*, that contracts publicly advertised fell within the jurisdiction of Section 1981. It did not decide whether that statute applied to wholly private, unadvertised contractual relationships negotiated with family members or close friends, and it asked to do so here.

The family-owned business and closely-held corporation are part of the traditional fabric of American society and invoke important associational rights. Oakland Scavenger

Company is a hybrid, having been organized in a merging of family-operated businesses. The associational rights it claims deserve as much respect as those asserted by the unrelated partners in *Hishon,* if not more.

Any differences in these two cases as to the form of business organization, the relationship between existing owners, and the manner of selection of new partners, as well as the similarity in the interests underlying the defenses in both, provide the court an opportunity to examine the broad implications of the expansive interpretation of these laws requested by plaintiffs in both cases and to state rules which apply in a wider range of circumstances.

B. The decision conflicts with the Eleventh Circuit's interpretation in Hishon v. King & Spaulding refusing to extend Title VII jurisdiction over selection of business partners

The Ninth and Eleventh Circuits are on collision courses in *Bonilla and Hishon,* if not in direct conflict on the facts. Far from accepting any notion that the voluntary association of business partners is protected, as implied by the court in *Hishon,* 678 F.2d at 1028, the Ninth Circuit in *Bonilla* has said that the strongest of associational rights is not sufficient to overcome the national interest in promoting employment opportunity for minorities. The Petition for a Writ of Certiorari in *Hishon,* at pages 13, 14 and 17 has relied very heavily on *Bonilla,* citing the decision to argue that an owner can be treated as an employee under Title VII, that "an employee's right to be considered for promotion on a non-discriminatory basis *is* covered by federal employment legislation, even if the employee would not be covered after the promotion" [emphasis in original], and that Title VII's broad sweep allows no exception for decisions concerned with entry into partnership. The two decisions represent opposite views about how far Congress intended to go with the redistribution of economic opportunity through employment.

C. The decision conflicts with each owner's constitutionally protected right to employ himself and his family in his own business free from unreasonable governmental interference[3]

The shareholders have a right to make agreements among themselves for compensation and assignments commensurate with their status as co-owners and in preference to that of all other employees. The right of a person to employ himself according to his own terms has been recognized by this Court as a fundamental human liberty for more than a century. In his dissent in *The Slaughter-house Cases,* 83 U.S. (16 Wall.) 36 (1873), Mr. Justice Bradley wrote that government's authority to regulate was limited by its obligation to preserve certain undefined but inalienable rights of life, liberty and property, and that essential to the enjoyment of these was the right to direct one's own business affairs:

> "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.
>
> "For the preservation, exercise, and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. This right to choose one's calling is an essential part of that liberty which is the object of government to protect; and a calling, when chosen, is a man's property and right.

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[3]The provisions of 28 U.S.C. § 2403(a) may apply. No lower court has certified to the Attorney General that the constitutionality of an act of Congress has been drawn in question.

> Liberty and property are not protected where these rights are arbitrarily assailed."

While the majority of the court did not accept Mr. Justice Bradley's views regarding the power of the federal government to invalidate state laws which impaired these rights, later decisions in *Greene v. McElroy*, 360 U.S. 474, 492 (1959) and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957) confirmed that the right to hold specific private employment and to follow a specific private profession free from unreasonable governmental interference came within the "liberty" and "property" concepts of due process.

The district court properly construed this to mean that the 135 owners of Oakland Scavenger Company had a protected right to reserve for themselves the most attractive and highest paying positions, and that neither Title VII nor Section 1981 could require them to equalize their hours of work and compensation with nonshareholders or share the higher-paying positions simply because there were no black or Spanish-surnamed owners. The Ninth Circuit made no express ruling on this issue, despite the supreme authority of the Constitution, and failed to explain its action.

The circuit court refused to accept the company's characterization of its shareholder preference as an exercise of proprietary rights. According to the circuit court, "The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment." However, as this court said in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32 (1961), proprietorship and employment are not mutually exclusive statuses. Dean O'Neal remarks in his treatise *Close Corporations* (1970 edition, supplemented 1982), Callaghan & Company, Sections 1.07 and 6.82, that the prospect of employment is frequently the primary reason why individuals participate in organizing close corporations, which customarily distribute a high

percentage of company earnings in the form of salaries rather than dividends, and that compensation for employment may be the shareholder's only substantial return on investment.

Economic reality is the test, not technical concepts. *Goldberg v. Whitaker House Cooperative, Inc., supra,* 366 U.S. at 33. The unassailable fact is that the shareholders are the owners, each with an equal interest, and that they have been for 63 years. They are not less owners because they work full-time for the company, are paid wages as well as dividends, or their shares are not freely transferable. Each has an equal voice in the operation of the company, one exercised through mandatory attendance at shareholders' meetings. All have a major investment, with a block of shares selling for $70,000 in 1978. Though the success of the venture now requires centralized operational management, it is not different from any large partnership having a management committee or managing partner. The distinctive rights and obligations of Oakland Scavenger Company shareholders were recognized by the California courts long before the enactment of Title VII, and it cannot be suggested that its organization is merely a device to avoid the statute. See *Perata v. Oakland Scavenger Company, supra; Oakland Scavenger Company v. Gandi, supra;* cf. *United Air Lines v. McMann,* 434 U.S. 192, 203 (1977).

There is no census data on the number of closely held or family-owned businesses in the United States. Forbes Magazine in 1976 counted more than 350 private companies having gross revenues in excess of $100 million per year, excluding insurance companies, banks, investment bankers, advertising and accounting firms, and co-ops, many run at the top by a single entrepreneur and his family. Minard, *In Privacy They Thrive,* Forbes, November 1, 1976, at 38. See also, *When a Family Company Outgrows the Family,* Business Week, August 1, 1977, at 68; Glassman, *A Family Affair,* Forbes, September 29, 1980, at 84; Morrison, *A*

Family With Roots in Poland, Not Denmark, Is Getting Himalayan Growth Out of an All-American Treat, Fortune, March 9, 1981, at 117. If Oakland Scavenger Company is unique among large privately-held corporations, it is only due to the large number of working shareholders. Measured against the largest law or accounting firms, many having more than 135 partners, shareholders, or partner corporations, it is not exceptional. See Wayne, *The Year of the Accountant,* New York Times, January 3, 1982, § 3, at 1, col. 2; *The Top 200 Law Firms,* National Law Journal, September 13, 1982, at 14, 16, 18-19, September 20, 1982, at 13-16.

Italian immigrants were responsible for many experiments in cooperative ownership and marketing in the late 1800's and early part of the century, mostly in agriculture. See Foerster, *The Italian Emigration of Our Times* (1919; reprint, New York 1968) p.370; *Rolle, The Immigrant Upraised: Italian Adventurers and Colonists in an Expanding Amercia* (Norman, Oklahoma, 1968) p. 266-267. Some, like the Italian-Swiss Agricultural Colony at Asti, California were built on utopian dreams in the tradition of Robert Owen. With the scavenger companies, it was the practical need to control their own livelihoods, to protect themselves "from degenerating into drones of useless shareholders." Perry, *San Francisco Scavengers,* p.19.

By applying Title VII to this situation, the Ninth Circuit forces the shareholders either to issue new shares to enough minority employees that the shareholders are representative of the community in mix, an impairment of the right to select their own business partners, or to abandon the right of assignment and pay premium. A third alternative would be to stop working. Each involves the loss of significant property rights which the circuit court has refused to weigh against the purposes of Congress in enacting Title VII.

The Ninth Circuit's decision here exposes every family-operated business with 15 or more employees to claims

of discrimination. It threatens to deprive Oakland Scavenger Company's shareholders of a major incentive to pay the high cost of shares. Many are still paying their fathers on installment notes with ten to twenty year terms, and their ability to retire the notes will be prejudiced if the better-paying positions and the pay premium cannot be preserved.

It was never the purpose of Congress in enacting Title VII to take the property and work of one man and give it to another. There is no reason to believe that the statute was designed to impair a person's constitutional right to work in his business at whatever job or compensation he chooses. This is even more true in the case of Section 1981, which in more than 110 years since enactment has never been so applied.

D. Business owners have a constitutionally protected right to prefer their family members as employees or business partners

The policy of passing shares to sons of shareholders, and if there was no son then to other qualified male family members, was formally approved by resolution of the shareholders in 1930 and incorporated into the bylaws in 1939. See *Oakland Scavenger Company v. Gandi, supra,* 51 C.A.2d at 73-74, 81; *Perata v. Oakland Scavenger Company, supra,* 111 C.A.2d at 379, 382. After 1968, only sons (1 son-in-law) purchased shares, most of them grandsons of former shareholders. Because employment preferences were associated with ownership, the Ninth Circuit held that transfer restrictions violated Title VII unless the company could "demonstrate that legitimate and overriding business considerations provide justification." 697 F.2d at 1303.

The practice was bred not as a device for invidious discrimination but for the mutual protection and support of the company's immigrant founders and their families. It was not to injure a particular class of people, but to acquire dignity and financial security for their children

and relatives at a time when the family provided the only "safety net."

In matters pertaining to family life, the balance between legitimate public interest and private rights weighs most heavily in favor of individual choice. Mr. Justice McReynolds wrote in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the court recognized the right of parents to determine the manner of education of their children. In *Cleveland Board of Education v. LeFleur*, 414 U.S. 632 (1974) this court voided on due process grounds school district regulations requiring teachers four months pregnant to take unpaid maternity leave because it found that "overly restrictive maternity leave regulations can constitute a heavy burden" on the teacher's protected freedom to decide whether to bear children. 414 U.S. at 640. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Moore v. City of East Cleveland*, 431 U.S. at 504, fn. 11.

But the overriding protection afforded individual choice in the parent-child relationship is nowhere so dramatically shown as in *Roe v. Wade*, 410 U.S. 179 (1973), where the court held that a woman's right to decide whether or not to end a pregnancy was fundamental, and only a compelling interest could justify government restraint. Government's interest in regulating conduct is never stronger than when it is called to prevent the taking of life. Conversely, the individual interest in that case is not nearly so compelling as where the parent acts to secure the child's welfare, as here. The balance is even less favorable to the government where, as here, the rule is judicially

created and not clearly mandated by Congress. Cf. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 731. This court's affirmation of individual freedom in the face of such powerful government interest defines a zone of protection which encompasses the rights asserted here. "The integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Moore v. City of East Cleveland*, 431 U.S. at 503, fn. 12, quoting *Poe v. Ullman*, 367 U.S. 497, 551-552 (1961) (Harlan, J., dissenting).

The family is an economic institution as well as a social one, and the court has extended the protection of substantive due process where the family acted together to meet its economic needs. In *Moore v. City of East Cleveland*, the court said, "Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and satisfactions of a common home . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore v. City of East Cleveland*, 431 U.S. at 505. And it is the family itself, not the home, which is protected. "The home derives its preeminance as the seat of family life." *Id.* at 503, fn. 12, quoting *Poe v. Ullman*, 367 U.S. at 551-552 (Harland, J., dissenting).

The concept of family is not limited to a strictly biological relationship and certainly a son-in-law, for example, could be a preferred employee or contractual partner. This court has said that a "family" is distinguished from other relationships by "emotional attachements that derive from the intimacy of daily association." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977).

An individual who owns a business has a right to employ his own children, no matter how numerous, even if they

occupy all of the management, supervisory or top operational positions, irrespective of the impact that may have on employment oportunities for others. If two or more owners of a business agree, for the mutual benefit of their respective families, that all of their children will have a place in the business, it is not less true that they are each providing for their own families, though some may have several children and the others none who choose to take advantage of the opportunity. They do so from an affection, instinct and sense of obligation that dates from the origins of man and has no foundation in the development of the institutions of slavery in America in the 17th and 18th Centuries. It is built on powerful human bonds, not derived from ignorance, fear or a history of oppression. It is not a classification "drawn 'with an evil eye and an unequal hand.'" See *NYC Transit Authority v. Beazer*, 440 U.S. 568, 593, fn. 40 (1979).

This court has upheld a Louisiana statute requiring river and harbor pilots to serve a six-month apprenticeship prior to certification, where incumbent pilots controlled the selection of apprentices, nearly always their friends and relatives. See *Kotch v. Board of River Pilot Com'rs*, 330 U.S. 552 (1947). The court noted, "Probably in pilotage more than any other occupation in the United States the male members of a family follow the same work from generation to generation." 330 U.S. at 562. As possible benefits of the system, the court mentioned, ". . . the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and esprit de corps which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment . . ." 331 U.S. at 563. Though a dissent disagreed about the authority of the state to impose a system of public service which turned upon lineage, it remarked upon the merits of the family business:

> "Indeed, something very worthwhile largely disappeared from our national life when the once prevalent familial system of conducting manufacturing and mercantile enterprises went out and was replaced by the highly impersonal corporate system for doing business." 300 U.S. at 566 (Rutledge, J., dissenting).

The Ninth Circuit relied on *Local 53 of the International Ass'n of Heat and Frost Insulator & Asbestos Workers v. Vogler* (5th Cir. 1969), 407 F.2d 1047, where a labor union having exclusive bargaining authority restricted membership to sons and relatives of its all-white membership, and *Grant v. Bethlehem Steel Corp.* (2nd Cir. 1980) 635 F.2d 1007 and *Domingo v. New England Fish Company* (W.D. Wash. 1977) 445 F.Supp. 421, where predominantly-white supervisors hired relatives and friends to the general but not complete exclusion of minorities. In each case a violation of Title VII was found, substantially based upon a history of prior discrimination in the selection of union members or supervisors.

There was no question in any of these cases of company owners hiring their own children or relatives. Neither the union in *Vogler* nor the supervisors in *Grant* and *Domingo* were exercising proprietary rights. Due process was not argued as a defense in any of these cases.

The State of California recognizes the difference between an employee preferring his own children and one who prefers the children of his employees or a labor union which restricts its membership. California Fair Employment and Housing Commission rules prohibiting discrimination in employment on various grounds including race, national origin and ancestry state, "Employee does not include any individual employed by his or her parents, by his or her spouse, or by his or her child." Title II California Administrative Code, Division 4, § 7286.5(b)(2), adopted 1980, amended 1982.

Each of the 50 states, the District of Columbia and Puerto Rico have fair employment practice laws. None pro-

hibits an employer from giving hiring preference to his children or family members, and there are no reported decisions in any of these jurisdictions supporting such a result. Such a rule would substantially inhibit the ability of business owners to give their children the experience necessary to become competent successors.

Oakland Scavenger Company cannot be required to prove a business necessity for these restrictions. The shareholders would be entitled collectively to hire their children and pass the business on to them if the children were the least qualified of all persons to continue the operations. If that right is to be abolished and long-cherished institution in this nation's history is to be uprooted, it should not be without explanation, clear statutory authority, and a careful accounting for the loss of an essential freedom and the benefit to society.

E. The selection of business partners is beyond the reach of the civil rights laws where there exists a purpose of exclusiveness on grounds other than race

The opportunity to purchase Oakland Scavenger Company stock has never been a right "enjoyed by white citizens." No new issues have been made since 1943, and severe formal restrictions on transfer have existed since at least 1930. Allowing for the most part only sons and male relatives to replace retiring shareholders meant that each transaction was negotiated on a highly personal level, and there was no need for advertising, brokers, underwriters or similar instrumentalities of commerce to conclude those transactions.

Twenty transfers from June 1968 to February 1980 were all to sons, except one son-in-law. In all other cases, the stock was retired by the company. This action was not filed until January 1975, well after the running of the period of limitations for any prior purchase. *Bratton v. Bethlehem Steel Corp.* (9th Cir. 1980) 649 F.2d 658.

The district court concluded that the sale of Oakland Scavenger Company stock had been made in private, unadvertised transactions and was therefore beyond the reach of Section 1981, citing *Runyon v. McCrary*, 427 U.S. 160, 190 (Powell, J., concurring). In *Runyon v. McCrary*, this court held that Section 1981 prohibited two private schools from excluding qualified children solely based on race. The court noted particularly, however, that the schools involved conducted area-wide marketing programs, including mass mailings and "yellow-page" ads in the telephone directory. Justice Powell stated in a concurring opinion:

> "But choices, including those involved in entering into a contract, that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Act." 427 U.S. at 188-189.

Justice Powell concluded that some contracts were "so personal as to have a discernible of exclusivity which is inoffensive to § 1981" and said that " 'a purpose of exclusiveness' other than the desire to bar members of the Negro race" would "certainly in most cases . . . invoke associational rights long respected." 427 U.S. at 187-188. In cases arising under 42 U.S.C. Section 1982, the court has also said that the statute has no application where there is a demonstrated "plan or purpose of exclusiveness" on grounds other than race. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1973); *Tillman v. Wheaton-Haven Recreation Association*, 310 U.S. 431 (1973); *Olzman v. Lake Hills Swim Club, Inc.* (2nd Cir. 1974) 495 F.2d 1333; *Wright v. Salsbury Club, Ltd.* (E.D.Va. 1979) 479 F.Supp. 378.

The Ninth Circuit did not test the shareholder preference or stock transfer restrictions against the standard of exclusivity, but based its opinion solely upon the large number of shareholders, tying in the jurisdictional standards

for Title VII. This court has not previously fixed Section 1981 jurisdiction to an arbitrary standard based on size, but has extended the protection of rights of association and privacy to much larger organizations. See *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963); cf. *Wright v. Salsbury Club, Ltd., supra*, 479 F.Supp. 378.

Dean O'Neal observes:

> ". . . shareholders in a close corporation commonly are greatly concerned about the identity of their associates and have a strong desire to gain and hold the power to choose future shareholders or at least to veto prospective purchasers of shares whom they consider undesirable. They are reluctant to run the risk of having the harmony and balance of their business organization disturbed or the mutual respect and confidence of the shareholder-managers shattered by the unwelcome intrusion of strangers. As a matter of fact, business men forming a close corporation not uncommonly consider themselves partners as to each other . . ."

O'Neal, *Close Corporations, supra*, Sections 1.07 and 7.02; See *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 161 N.Y.S. 2d 418 (1957); *Doss v. Tingling Corp.*, 95 Ind.App. 494, 172 N.E. 802 (1930); *Rafe v. Hindin*, 29 App.Div. 481, 288 N.Y.S.2d 662 (1968); *Coast Bank v. Minderhout*, 61 Cal.2d 311, 38 Cal.Rptr. 505 (1964). The rights and interests asserted here are not significantly different from those of common law partners, and to deny them will have sweeping implications for corporations of all sizes.

Because Section 1981 arguably reaches the selection of business associates even if Title VII does not, review is needed to determine the rights and obligations of business people in effecting that choice, irrespective of the business form.

F. The circuit court improperly used the disparate impact test to expand the number of protected classifications beyond those specified in Title VII

Since Title VII does not expressly prohibit employers from giving preference in hiring to themselves or their children, the Ninth Circuit had to rely on a "disparate impact" test. It ruled that a disparate impact existed because all shareholders were persons of Italian ancestry, as naturally were their children, resulting in an exclusion of black and Spanish-surnamed employees from the preferred group. Of course, employees of Italian ancestry who were not shareholders or children of shareholders (nearly as many as those who were shareholders) were equally excluded, as were other white persons.

The Ninth Circuit relied on an expanded interpretation of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, this court stated that, "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. Under *Griggs*, employment practices neutral in terms of intent were said to be prohibited if they operated "to 'freeze' the status quo of prior discriminatory employment practices." What was required was "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431. If an employment practice operated to exclude minority employees and could not be shown to be related to job performance, the practice was prohibited.

Congress recognized the difficulty of proving discriminatory intent when Title VII was enacted. Senator McClellan introduced an amendment to several portions of the original bill by adding the word "solely" so, for example, it would be unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, *solely* because of such individual's race, color, religion, sex, or national origin . . ." Legislative History of Titles VII and XI of the Civil Rights Act of 1964, p. 3124, Sen. June 15, 1964, pp. 13837-13838. The amendment was defeated because, as Senator Case stated, "this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless."

It followed that this court in *Griggs* and later decisions would deny to employers the opportunity to substitute, even unintentionally, indirect means of denying employment to minorities for the open policies of discrimination which existed prior to 1964. See *Connecticut v. Teal*, ... U.S. ....., 102 S.Ct. 2525 (No. 80-2147, June 21, 1982). But when Congress detailed in Title VII the five grounds upon which employers were prohibited from making employment decisions, it did not authorize the courts to expand the list to prohibit discrimination on account of family relationship. The statute does not require Hatfields to hire McCoys.

The decision of an owner to hire his children is not arbitrary, regardless of their qualifications, and it does not operate invidiously. Nor does it defeat the statute by freezing the status quo of prior discriminatory practices within the meaning of *Griggs*, since employment decisions made prior to 1964 based upon family relationship were not the target of Congress in enacting Title VII.

Unless this court acts to deny the use of the "disparate impact" test as a "back door" attack on conduct not prohibited under Title VII, those family-owned businesses and closely-held corporations successful enough to have more than 15 employees will be exposed to a lawsuit whenever a disappointed applicant or employee is passed over in favor of a family member.

G. The circuit court improperly extended jurisdiction under 42 U.S.C. § 1981 to decisions not based on race

By apparently permitting the claim under Section 1981 to survive under a disparate impact test, the Ninth Circuit's decision conflicted with this court's holding in *General Building Contractors Association, Inc. v. Pennsylvania*, ... U.S. ....., 73 L.Ed.2d 835 (June 25, 1982), that only "*racially motivated* deprivations of the rights enumerated in the statute" would support a remedy under Section 1981. 73 L.Ed.2d at 847 [emphasis in original] quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968). The discrimination must be purposeful and it must be on account of race. See *MacDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 285 (1976). Respondents cannot resist a motion to dismiss by alleging favored treatment based on family membership.

Even if it were alleged that in the formation of the company, and up to 1968 in the few cases where shares were transferred to friends of shareholders where no son or male relative wished to buy, Italian ancestry was a criterion for selection, Section 1981 does not prohibit practices which exclude on grounds of common language or ancestry. *Hiduchenko v. Minneapolis Medical and Diagnostic Center, Ltd.* (D.Minn. 1979) [Ukranians]; *Budinsky v. Corning Glass Works* (W.D.Pa. 1977) 425 F.Supp. 786 [Slavs]; *Kurylas v. Department of Agriculture* (D.D.C. 1974) 373 F.Supp. 1072, affd. without opinion (D.C.Cir. 1975) 524 F.2d 894 [Poles]. Only where a national group has been perceived as racially different, for instance Mexican-Americans or Japanese-Americans, has it enjoyed protection under Section 1981. See, e.g., *Sabala v. Western Gilette, Inc.* (5th Cir. 1975) 516 F.2d 1251; *Alvarado v. El Paso Indep. School District* (5th Cir. 1971) 445 F.2d 1011; *Cubas v. Rapid American Corp.* (E.D. Pa. 1976) 420 F.Supp. 663; *Spiess v. C. Itoh & Co.* (S.D. Tex. 1976) 408 F.Supp 916. Section 1981, once codified with the immigration laws and viewed by this court as part

of a "comprehensive plan for the nation-wide control and regulation of immigration and naturalization," has been extended to protect aliens. *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 419 (1948) and *Graham v. Richardson,* 403 U.S. 365, 377-378 (1971). Here there is no claim of discrimination on grounds of alienage.

The plaintiff class has been defined in terms of black and Spanish-surnamed employees, indicating that Italian-American shareholders are not perceived by them to be racially different from white persons generally. A policy which favors family members who are persons of Italian ancestry but excludes whites generally cannot be attributed to racial animosity toward black or Spanish-surnamed employees, though they may be excluded as well.

H. The Ninth Circuit improperly refused to permit the district court to consider the same documents upon which the circuit court based its finding of a prima facie case

In the first part of the opinion, the court of appeals said it was improper for the district court to consider matters outside the pleadings, because its opinion referred to defendant's motion as one for dismissal, 697 F.2d at 1301. Yet the circuit court acknowledged that the company had filed "a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a valid claim, along with a motion for summary judgment under Fed.R.Civ.P. 56(b)." *Id.* The summary judgment motion was supported by uncontradicted evidence that, as between non-shareholders, every job was awarded by bid to the most senior employee bidding, a fact acknowledged by the circuit court. 697 F.2d at 1300.

By itself, this issue would not normally merit this court's attention. But here, in the second part of its opinion, the court of appeals itself treated the motion as one for summary judgment by plaintiffs and held in part II that plaintiffs had already established a prima facie case.

Had defendant not designated its motion as one under Rule 56, which it did, Rule 12(b) would still require that

on a motion "to dismiss for failure of the pleading to state a claim upon which relied can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." *Evans v. McDonnell Aircraft Corp.* (8th Cir. 1968) 395 F.2d 359, 361; *Williams v. Pacific Maritime Association* (9th Cir. 1967) 384 F.2d 935, 936, cert.den. 390 U.S. 987. Absent proof that the seniority system was designed with a discriminatory intent, Oakland Scaveneger Company was entitled to judgment under part I of the opinion. *Pullman-Standard v. Swint,* ..... U.S. ....., 102 S.Ct. 1781, 72 L.Ed.2d 66, 72 (1982); *California Brewers Association v. Bryant,* 444 U.S. 598 (1980).

Plaintiffs' affidavits contained only conclusory allegations insufficient to oppose a Rule 56 motion. *Turner v. Teamsters Local 302* (9th Cir. 1979) 604 F.2d 1219, 1228. Having expressly found those allegations to be inadequate even to state a claim for which relief could be granted, the district court properly dismissed, though summary judgment for defendants woud have been the correct result procedurally.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

Case No. 81-4522

D.C. No. C-75-0060-WAI

Joaquin Moreles Bonilla, et al. individually and on behalf of all others similarly situated,
Plaintiffs in Intervention,

v.

Oakland Scavenger Company, et al.,
Defendants.

Perfecto Martinez, et al.,
Plaintiffs,

v.

Oakland Scavenger Company, et al.
Defendants.

OPINION

Appeal from the United States District
for the Northern District of California
William A. Ingram, District Judge Presiding.

Filed November 9, 1982
As Amended February 17, 1983

OVERVIEW

In January 1975 a group of black and Spanish-surnamed employees filed an individual and class-action discrimination suit against their employer, the Oakland Scavenger Company, and their union, Local 70 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. After the first group of plaintiffs had settled their individual claims, the present group of one black and fourteen Spanish-surnamed employees inter-

vened. The class of plaintiffs consisted of all black and Spanish-surnamed employees of the Company who were dues-paying members of the Union.

The complaint charged the company with discriminating on the basis of race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*,[1] and the Civil Rights Act of 1866, 42 U.S.C. § 1981.[2]

The plaintiffs specifically charged the Company with (1) discriminating against black and Spanish-surnamed employees by restricting ownership of the Company's shares to "family members," all of whom were of Italian ancestry, and (2) discriminating among the nonshareholder-employees on the basis of race and national origin. The plaintiffs charged the Union with breaching its duty of fair representation by including the shareholder preference plan in the collective bargaining agreement and by not

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[1]Title VII provides, in relevant part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

[2]Section 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

42 U.S.C. § 1981.

representing a former employee at a grievance hearing.[3] The plaintiffs sought appropriate relief and monetary damages.

The district court dismissed the action against the Company under Fed. R. Civ. P. 12(b)(6) on the ground that the plaintiffs had failed to state a claim upon which relief could be granted. Its order of dismissal did not mention the plaintiffs' complaint against the Union, nor did it discuss the charge of discrimination among nonshareholder-employees.[4] We reverse and remand.

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[3]The claim that the Union breached its duty of fair representation by not representing Madden during a grievance proceeding is moot. Madden settled his claims against the Union and the Company.

Plaintiffs found their complaint against the union on the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* However, the more appropriate basis for this cause of action as far as it relates to the inclusion of the shareholder preference plan in the collective bargaining agreement is Title VII, which provides in relevant part:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. 2000e-2; *see* Section III, *infra.*

[4]The district court stated, in relevant part:

> Plaintiffs have failed to state a claim that is cognizable under Section 1981 or Title VII. . . .
>
> Section 1981 prohibits racial discrimination in the making and enforcement of contracts. Plaintiffs have alleged that they

FACTS

The Oakland Scavenger Company began as a garbage collection company founded in 1909 by a number of independent garbage collectors and scavengers. The five original directors, the original shareholders, and all succeeding directors and shareholders have been of Italian ancestry. Until World War II created a labor shortage, all employees of the Company were shareholders. Since that time, it has hired as many "outsiders" as it needed to fill positions that it could not fill with other family members or close friends of Italian ancestry. The percentage of shareholder-employees decreased so that by 1978 only about one-quarter of the employees were shareholders. The number of shareholder-employees fell as well, from a peak of 208 in 1943 to approximately 135 by 1978. The number of shareholder-

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were excluded from ownership of Oakland Scavenger Company stock on the basis of race and national origin in violation of their right to make and enforce contracts in the same manner which is enjoyed by white citizens generally. While it is clear that Section 1981 extends to private conduct as well as state action, *Johnson v. Railway Express Agency*, the Supreme Court has limited its application in at least one significant respect. It is not applicable to "truly private" organizations, where there is a "plan or purpose of exclusiveness" other than race. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). In the instant case all sales of stock during the applicable period of limitations were to sons, and in one case the son-in-law of existing stockholders, or to the Oakland Scavenger Company itself. . . . The stock was not advertised nor was it publicly offered in any way. Choices that are not part of a commercial relationship that is offered generally or widely were not intended to be within the scope of the Act. *Runyon v. McCrary*, 427 U.S. 160, 190 (1976).

Having established that one the facts presently before the Court Section 1981 does not prohibit the private unadvertised sale of Oakland Scavenger Company stock, it is apparent that plaintiffs have failed to state a claim under Title VII as well. . . . Plaintiffs have cited no authority, and apparently none exists, which would demonstrate that the shareholders of the Oakland Scavenger Company may not exercise their proprie-

employees assigned to each garbage collection truck dropped from as many as four to at most one.

Since the Company is a "membership corporation," a person cannot buy shares in the Company without the approval of all the other shareholders. The shareholders' agreement, signed by every shareholder, provides that the share certificates remain in the custody and possession of the board of directors during the shareholder's life. When a shareholder dies, title to his shares passes to the board. The board then issues a new certificate to a suitable surviving child or relative, if one is available. Every shareholder owns an equal block of 100 shares. He or she is required to be a full-time permanent employee of the Company. The shares are not transferable without board permission, they are not publicly traded, and there are no outside investors in the Company. Every new shareholder employee has either a relative or a close friend who is a shareholder-employee in the Company. Since May 1968 all new shareholder-employees have been children or, in one case, a son-in-law, of shareholder-employees. The shareholder agreement is discussed more fully in *Perata v. Oakland Scavenger Co.*, 111 Cal. App. 2d 378 (1952).

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tary preference and reserve for themselves and their families the most attractive and highest paying positions. The right to hold specific private employment and to follow a specific private profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment of the United States Constitution. *Green v. McElroy*, 360 U.S. 474, 492 (1959). Similarly, an individual cannot be precluded from pursuing any lawful occupation in a manner inconsistent with due process or the equal protection of the laws. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957). From this it follows that the stockholders of the Oakland Scavenger Company have the right to employ themselves and their families at whatever position and salary they can afford.

Accordingly, the defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) is hereby granted.

There are basically three nonmanagerial types of jobs in the Company: head route drivers, single route drivers, and helpers. The head route drivers have some additional responsibilities, and they receive a wage premium of $5.00 more per day than helpers. Single route drivers receive $2.50 or $3.50 more per day than helpers. All drivers are guaranteed nine and one-half paid hours per day. Helpers generally receive no more than eight paid hours per day.

Under the shareholder preference plan, the board of directors has the right to assign the preferred driver positions to shareholder-employees. As a result, in 1978 there was only one shareholder-employee who was a helper. All other shareholder-employees were either drivers or members of management.

The nonshareholder-employees first joined Local 70 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers in February 1967. Since then, a series of three-year collective bargaining agreements between the Company and the Union has been in effect. Some time after the original organization, the nonmanagerial shareholder-employees joined the Union to protect their preferred driver jobs. The collective bargaining agreement incorporated and preserved the shareholder-employees' right of assignment, which permits the shareholder-employees to assign the preferred and higher paying driver jobs to themselves, regardless of the seniority of any nonshareholder-employee .The jobs not filled with shareholder-employes by the right of assignment went to the senior qualified bidder among the other employees.

ANALYSIS

I. Discrimination Between White and Minority Nonshareholder-employees

The first count of the original plaintiffs' first amended complaint, which was incorporated into the intervening plaintiffs' subsequent complaint, alleged that the Company discriminated against minority nonshareholder-employees in terms of wages and job assignments. The district court

did not specifically discuss this claim when it dismissed the plaintiffs' cause of action for failure to state a claim upon which relief could be granted.

The Company had filed, among other pleadings, a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim, along with a motion for summary judgment under Fed. R. Civ. P. 56(b). The district court considered evidence extraneous to the pleadings before granting the Rule 12(b)(6) motion to dismiss. As the Company concedes on appeal, this was error. We have held that a district court commits reversible error when it considers matters extraneous to the pleadings while treating the motion as one to dismiss, rather than as one for summary judgment. *See Costen v. Pauline's Sportswear, Inc.*, 391 F.2d 81, 84-85 (9th Cir. 1968); *see also Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Williams v. Pacific Maritime Ass'n*, 384 F.2d 935, 936 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968); Fed. R. Civ. P. 12(b).

The allegation of discrimination against minority nonshareholder-employees states a valid basis for seeking relief under Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971), and Section 1981, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). *See Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, No. 80-4120, slip op. 3733 (9th Cir. August 24, 1982).

The plaintiffs are entitled to an opportunity to establish a prima facie case of disparate treatment between white and minority nonshareholder-employees. Disparate treatment arises when an

> employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

On remand the plaintiffs should be given an opportunity to meet their initial burden of proving by a preponderance of the evidence a prima facie case of disparate treatment. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The plaintiffs' threshold burden is not onerous, *id.* at 253, and will be satisfied if they introduce evidence

> showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under [Title VII]."

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978), *quoting Teamsters*, 431 U.S. at 358 [footnote omitted]. The statistical evidence supplied by the parties is not sufficiently reliable for us to decide at this stage whether the plaintiffs have established a prima facie case of disparate treatment among the nonshareholder-employees on the basis of race and national origin.

If the plaintiffs meet their initial burden, the burden of production will shift to the Company "to articulate some legitimate, nondiscriminatory reason" for the disproportionately low number of minority employees in the preferred driver positions. *Burdine*, 450 U.S. at 253, *quoting McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The Company can meet this burden by offering sufficient admissible evidence to raise a genuine issue of fact as to whether it unlawfully discriminated among the nonshareholder-employees on the basis of race and national origin. 450 U.S. at 254-55, 257.

If the company meets this burden, the burden of production will shift back to the plaintiffs and merge with their ultimate burden of persuading the court that the Company's asserted justification was not its true reason, but merely a pretext for discrimination. *Id.* at 253, 256.

The district court's failure to follow these steps was error.

A Title VII plaintiff may also merit relief upon a showing of disparate impact. However, the disparate impact theory of proving discrimination is unavailable in this case if the evidence supports the Company's allegation that the racial imbalance among the nonshareholder-employees in the preferred jobs is due to a facially neutral bona fide seniority system. Because Section 703(h) of the Act exempts from Title VII bona fide seniority systems, "a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination." *Pullman-Standard v. Swint*, 50 U.S.L.W. 4425, 4426 (April 27, 1982). Rather, the plaintiffs must in addition show that the Company adopted the system specifically because of its discriminatory impact. "As § 703(h) was construed in *Teamsters*, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system." *Id* at 4429.

It would also have been error to grant the Company's motion for summary judgment. Viewed in the light most favorable to the plaintiffs and read as a whole, the pleadings, affidavits, and depositions raise a genuine issue of fact as to whether the Company intended to prefer white nonshareholder-employees over black and Spanish-surnamed nonshareholder-employees.

Upon the record before us, the plaintiffs are entitled to a trial on the merits on this allegation of discrimination.

II. Discriminatory Effect of the Company's Shareholder Preference Plan

The plaintiffs also charge that the Company's shareholder preference plan illegally discriminates against black and Spanish-surnamed employees (1) in assigning the better jobs with higher pay and more guaranteed hours to the shareholder-employees, who were exclusively of Italian ancestry, and (2) by limiting share ownership to persons who were of Italian ancestry and were either members of the family or close friends of a current shareholder.

The Company argues that Title VII has no application to discrimination in the sale of corporate stock. Even if this is so, however, it does not help the Company's position here. Since the Company ties preferential wages, hours, and job assignments to ownership of its stock, the shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII. The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment. The Company describes itself as a "membership corporation." At least a quarter of its employees are stockholders, each of whom binds himself or herself under the bylaws and stockholders' agreement to permanent, full-time employment. Stockholders also agree not to withdraw from employment without the express consent of the board of directors. The stock is not freely transferable: Upon the death of a stockholder, his or her shares vest in the board, which then issues them to a successor. Each stockholder owns an equal interest in the company, represented by a block of 100 shares. The shareholders never possess their share certificates, as they are retained by the board of directors. While we decline to lay down an all-encompassing rule, under these circumstances the admittedly discriminatory employment practices of the Company are within the reach of Title VII in spite of the effort to define those practices as "proprietary rights."

Having found Title VII applicable, we analyze the claim of discrimination under the disparate impact theory articulated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the Company concedes, the shareholder preference plan, while neutral on its face, has a discriminatory impact on the Company's minority employees. In situations such as this, where a facially neutral employment practice, plan, or procedure has a disproportionately adverse effect on minorities, discriminatory intent need not be demonstrated. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324,

349 n.32 (1976); *Gibson v. Local 40, Supercargoes & Checkers of the International Longshoremen's and Warehousemen's Union*, 543 F.2d 1259, 1268 (9th Cir. 1976).

Because the disparate impact of the shareholder preference plan is clear, the burden shifts to the Company to demonstrate that legitimate and overriding business considerations provide justification. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-35 (1975); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1980), *cert. denied*, 102 S.Ct. 1719 (1982). To meet this burden, the Company points to an allegedly superior interest in protecting and providing for members of the immediate families of the founders of the Company. But Title VII case law has from the beginning made clear that nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all.

The issue has most frequently arisen in the context of nepotistic preferences for union membership. In *Local 53 of the International Ass'n. of Heat and Frost Insulator & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the Fifth Circuit held that, [i]n pursuing its exclusionary and nepotistic policies, Local 53 engaged in a pattern and a practice of discrimination on the baisis of race and national origin both in membership and referrals." *Id.* at 1050. The court noted that "[w]hile the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership." *Id.* at 1054.

The Fourth Circuit followed *Vogler* in a similar case involving a nepotistic employment preference, rejecting the union's reliance on a constitutional right to pursue a livelihood:

> The desire of a union to insure family security by restricting new membership to the sons and close relatives of present members may constitute a legiti-

> mate "business purpose." But it cannot override the racial impact where present union membership is all-white.

Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.5 (4th Cir. 1971).

These cases are consistent with the Supreme Court's admonishment that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430. We cited *Griggs* in *Gibson, supra*, where we held that an employer's discriminatory practice of assigning jobs partly on the basis of nepotism violated Title VII. 543 F.2d at 1268. Other courts have continued to prohibit nepotistic practices which adversely affect minorities by freezing the discriminatory status quo. *See, e.g., Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1019 (2d Cir. 1980); *Domingo v. New England Fish Co.*, 445 F.Supp. 421, 435-36 (W.D.Wash. 1977).

We reject the Company's argument that its legitimate interest in protecting its family members overrides the countervailing national interest in eliminating employment discrimination based on race and national origin. To the extent that preferential wages, hours, and job assignments are tied to ownership of the Company's stock, the shareholder preference plan violates Title VII because the plan's effect is

> to discriminate against [plaintiffs] with respect to [their] compensation, terms, conditions, or privileges of employment because of [their] race, color, . . . or national origin.

42 U.S.C. § 2000e-2(a).

We emphasize that our decision by no means interferes with the capacity of the proprietors of a small family-owned business, or, for that matter, any small business, to conduct its affairs with heightened solicitude toward family

or friends. In enacting Title VII, Congress specifically exempted employers with twenty-five or fewer employees from its coverage. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, Title VII, § 701(b) (codified as amended at 42 U.S.C. § 2000e(b)). In 1972 Congress amended the section to exclude from coverage employers with fifteen or fewer employees, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, § 2(2) (currently codified at 42 U.S.C. § 2000e(b)), though the House version of the bill had originally suggested an even lower threshold. *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2155, 2161. The inclusion of this provision demonstrates Congress's due regard for the special concerns of smaller businesses. Here, however, we deal with an enterprise employing nearly 500 people. The "family" consists of more than 100 members and at one time included as many as 208. We will not dilute Title VII's imperative by altering the balance Congress has already struck.

We need not decide whether a restriction on the ability to purchase or own the Company's shares in and of itself would also violate Title VII. We note in passing that under this unusual share ownership plan, the payment of dividends might be equivalent, for purposes of Title VII, to the payment of a wage premium. Every shareholder must be of Italian ancestry. The distribution of dividends to this group of preferred employees might be no different than the payment of a wage premium to the same group of employees and might therefore violate Title VII. We reserve ruling, however, since neither the issue nor the evidence is squarely before us.

We reverse the district court's dismissal and remand for a hearing on whether there is any other justification for an admittedly discriminatory practice.

III. The Plaintiffs' Claim Against the Union

The plaintiffs charged the Union with breaching its duty of fair representation by including the shareholder prefer-

ence plan and right of assignment in the collective bargaining agreement.

The district court failed to address this claim. On remand the court should do so.

Title VII and Section 1981 prohibit discrimination by unions to the same extent they prohibit discrimination by employers. *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273, 284-85 (1976). The union has an affirmative obligation to oppose employment discrimination against its members. If it instead acquiesced or joined in the Company's discriminatory practices, it too is liable to the injured employees. *Id.; Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Operators*, 525 F.2d 2354, 2360 (9th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973).

REVERSED AND REMANDED.

APPENDIX B

In the United States District Court
For the Northern District of California

Case No. C-75-0060-WAI

Perfecto Martinez, et al., Plaintiffs,

v.

Oakland Scavenger Company, et al.

Joaquin Moreles Bonilla, et al.,
Plaintiffs in Intervention,

v.

Oakland Scavenger Company, et al.
Defendants.

ORDER

Filed February 17, 1983

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Anderson and Farris have voted to reject the suggestion for rehearing en banc and Judge Kashiwa would so recommend.

The opinion filed November 9, 1982, shall be amended as follows:

Delete the first sentence of the first full paragraph at slip op. 5312: "The dismissal was also error as a ruling on the motion for summary judgment."

Revise the second sentence in the second full paragraph of Section II at slip op. 53123 to read: "Even if this is so, however, it does not help the Company's position here."

Delete the words "and all the full-time employees of the Company of Italian ancestry are shareholders" in the third sentence of the fourth paragraph at slip op. 5315.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The opinion filed November 9, 1982, is amended as set forth above.

APPENDIX C

In the United States District Court
For the Northern District of California

Case No. C-75-0060-WAI

Perfecto Martinez, et al., Plaintiffs,

v.

Oakland Scavenger Company, et al.

Joaquin Moreles Bonilla, et al.,
Plaintiffs in Intervention,

v.

Oakland Scavenger Company, et al.
Defendants.

ORDER

Plaintiffs have instituted this suit alleging discrimination based on race and national origin in the hiring and promotion practices of the Oakland Scavenger Company, in violation of Title VII of the Civil Rights Act of 1964, U.S.C. § 2000(e) *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Plaintiffs have also joined a claim against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 70 ("Local 70"), alleging breach of duty of fair representation in violation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

Defendants Oakland Scavenger Company and Local 70 have moved to dismiss the complaint for summary judgment on the grounds, inter alia, that Section 1981 does not apply to the private unadvertised sale of corporate stock and that the stockholders of the Oakland Scavenger Company enjoy a proprietary preference in employment which is not subject to regulation under Section 1981 or Title VII.

Plaintiffs have failed to state a claim that is cognizable under Section 1981 or Title VII. The allegations of discrim-

ination by the Oakland Scavenger Company in its hiring and promotion policies are conclusory and do not demonstrate that the conduct at issue here is proscribed under either statute.

Section 1981 prohibits racial discrimination in the making and enforcement of contracts. Plaintiffs have alleged that they were excluded from ownership of Oakland Scavenger Company stock on the basis of race and national origin in violation of their right to make and enforce contracts in the same manner which is enjoyed by white citizens generally. While it is clear that Section 1981 extends to private conduct as well as state action, *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-461 (1975), the Supreme Court has limited its application in at least one significant respect. It is not applicable to "truly private" organizations, where there is a "plan or purpose of exclusiveness" other than race. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). In the instant case all sales of stock during the applicable period of limitations were to sons, and in one case the son-in-law of existing stockholders, or to the Oakland Scavenger Company itself. *See* Exhibit C to the affidavit of Peter Borghero. The stock was not advertised nor was it publicly offered in any way. Choices that are not part of a commercial relationship that is offered generally or widely were not intended to be within the scope of the Act. *Runyon v. McCrary*, 427 U.S. 160, 190 (1976).

Having established that on the facts presently before the Court Section 1981 does not prohibit the private unadvertised sale of Oakland Scavenger Company stock, it is apparent that plaintiffs have failed to state a claim under Title VII as well. Title VII, 42 U.S.C. § 2000e-2, prohibits discrimination in employment practices on the basis of race, color, religion, sex or national origin. Plaintiffs have cited no authority, and apparently none exists, which would demonstrate that the shareholders of the Oakland Scavenger Company may not exercise their pro-

prietary preference and reserve for themselves and their families the most attractive and highest paying positions. The right to hold specific private employment and to follow a specific private profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment of the United States Constitution. *Green v. McElroy,* 360 U.S. 474, 492 (1959). Similarly, an individual cannot be precluded from pursuing any lawful occupation in a manner inconsistent with due process or the equal protection of the laws. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957). From this it follows that the stockholders of the Oakland Scavenger Company have the right to employ themselves and their families at whatever position and salary they can afford.

Accordingly, the defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) is hereby granted.

Dated: 8/31/81

WILLIAM A. INGRAM
United States District Judge

APPENDIX D

In the United States District Court
For the Northern District of California

Case No. C-75-0060-WAI

Perfecto Martinez, et al., Plaintiffs,

v.

Oakland Scavenger Company, et al.

Joaquin Moreles Bonilla, et al.,
Plaintiffs in Intervention,

v.

Oakland Scavenger Company, et al.
Defendants.

JUDGMENT OF DISMISSAL

Filed August 31, 1981

The above-entitled action is dismissed for failure to state claim upon which relief may be granted. Fed.R.Civ. P. 12(b)(6).

WILLIAM A. INGRAM
United States District Judge

APPENDIX E

PROVISIONS OF LAW INVOLVED

Amendment 5 of the Constitution for the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 42 U.S.C. § 1981, R.S. § 1977, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title VII, § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), provides in pertinent part:

> Definitions
>
> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title XI, or receivers.

> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, . . .

Section 701(a),(b), 42 U.S.C. § 2000e(a),(b).

Unlawful Employment Practices

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), (2).

Rule 12(b), Federal Rules of Civil Procedure provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted,

(7) failure to join a party under Rule 19. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

No. 82-1699

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OAKLAND SCAVENGER COMPANY,
Petitioner,

vs.

JOAQUIN MORELES BONILLA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court's intercession is either sufficiently urgent or wise in an interlocutory context (1) in which substantive and procedural errors committed by the district court will in all events require further proceedings in that court on vital issues, including at minimum one entire facet of the racial and ethnic discrimination in employment involved but unaddressed by that court or the present petition, and (2) in which, pending elucidation by additional evidence in the further proceedings, the decision of the Court of Appeals does not threaten precipitous frustration of, but potentially expedites, the wholesome policy and purpose of the Congressional enactments prohibiting employment discrimination based on race or national origin?

Variantly put, whether, in such a context, the inevitable delay occasioned by this Court's interlocutory review in the full litigation and potential cure of at least one entire facet of invidious employment discrimination is sufficiently justified by the petition's exclusive concerns with the other facet of discrimination involved, including the alleged conflict with the Eleventh Circuit in a matter now pending before this Court, *Hishon v. King & Spaulding* (U.S. Supreme Court Docket No. 82-940, cert. granted January 24, 1983) 51 U.S.L.W. 3552?

Whether, on proper assessment of the facts and the instant opinion of the Court of Appeals, the errors and perils attributed to the opinion by the petition, including the alleged kinship and conflict with *Hishon*, are truly present at all, let alone with the sufficiency and urgency calling for this Court's intercession in the interlocutory context involved?

INTERESTED PARTIES

With an important caveat, the list of interested parties set forth in the petition may be accepted as correct. As is clear from their pleading, respondents seek to represent a class (thus far uncertified) of all persons similarly situated, and, although it is not now feasible to name the absent but potential class members, their involvement and interest through representation is worthy of note.

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No. 82-1699

In the Supreme Court

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the present petition should be denied for the reasons stated below.

I

THIS COURT'S INTERCESSION IS NEITHER URGENT NOR WISE IN THE INTERLOCUTORY CONTEXT INVOLVED

A. Further Proceedings in the District Court on Vital Issues Will in All Events Be Required by Reason of Its Substantive and Procedural Errors Correctly Analyzed by the Court of Appeals and Impossible of Meaningful Defense by Petitioner.

One cogent ground for denial of the petition, without more, is the purely interlocutory posture of the litigation at this juncture. Denial on that ground is consistent with the general rule followed by this Court and is particularly ap-

propriate here in light of special considerations fortifying a refusal to intercede at this stage. Whatever else may be true, it is beyond question that the district court committed substantive and procedural errors in respects requiring reversal and remand in all events and that further proceedings in that court will, therefore, be necessary on vital issues, including one entire facet of the invidious employment discrimination involved. The Court of Appeals correctly analyzes the situation in the first part of its opinion (Appendix A to Petition, pp. 6-9), and petitioner does not even purport to attack that part of the opinion in any way meaningful to intervention by this Court, addressing itself only to the second part of the opinion for all practical purposes.

1. The Errors.

In spite of emphasis by respondents at the time, the district court in dismissing the case inexplicably overlooked that, both by their pleading and their showing in opposition to dismissal, respondents were claiming invidious employment discrimination of two kinds, namely, as between, on the one hand, nonshareholding employees of the company who are black or Spanish-surnamed (hereinafter "minority employees") and other nonshareholding employees and as between, on the other hand, nonshareholding minority employees and shareholding employees, who are exclusively of Italian ancestry. Among the data developed by discovery in the former connection were, for example, that, as of the end of 1978, there were 21 nonshareholders in the desirable position of head route driver. Under the pertinent population factors of 15% and 12.6% applicable to black and Spanish-surnamed persons respectively, it is apparent that, given equal or greater seniority and the lack of discrimi-

nation, 3 black and 2 or 3 Spanish-surnamed employees would have been among the persons holding those 21 positions. Yet, this was far from the truth. Even though, at the end of 1978, the company employed 48 black persons, 10 of them hired before 1960, none of them was a head route driver, and, even though there were then 119 Spanish-surnamed employees, 26 of them hired before 1960, only one of them was a head route driver, having obtained that position in 1978. Of the 21 nonshareholding head route drivers at the end of 1978, 15 were employees who were neither black nor Spanish-surnamed and who were hired in or after 1970, 10 or more years junior to the 10 black and 25 Spanish-surnamed employees denied that position.

Nevertheless, the district court focused exclusively (as had the company and the union in their moving papers) on the other facet of discrimination claimed and simply failed to consider or even mention the claim of discrimination as between nonshareholding minority employees and other nonshareholding employees. (See Appendix C to Petition.) To make matters worse, although purporting to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court considered some matter extraneous to the pleadings submitted by the company, which, of course, under the terms of the rule itself, meant that dismissal could no longer occur under that rule but only, if at all, through summary judgment in conformity with Rule 56. However, viewed as a ruling on a motion for summary judgment with due regard for the requirement that the record must be considered in the light most favorable to the opponent, the dismissal was no more defensible since the court gave no consideration whatsoever to the submissions by respondents, including the showing of the facet

of discrimination totally ignored. (E.g., *U. S. v. Diebold*, 369 U.S. 654, 655 (1962).) Still more, as to the other and only facet of discrimination discussed, whatever salvation could be accorded to the company by the court's reasoning of nepotistic motivation, proprietary right, and the like was certainly unavailable to the union, and yet the dismissal was granted as to the union as well, without any separate discussion of its position.

In short, the dismissal resulted from an incurable, substantive and procedural muddle requiring reversal and remand, regardless of the validity of the accompanying analysis as far as it went and could go.

2. The Correctness of the Court of Appeals' Disposition Without Meaningful Attack by Petitioner.

Inevitably, and on the basis of ample reason and authority, the opinion of the Court of Appeals (Appendix A to Petition, pp. 6-9) makes clear the errors committed with respect to the facet of discrimination ignored by the district court and the consequent need to reverse and remand in all events. Although not giving the details, it does recognize (at p. 8) the existence of a "disproportionately low number of minority employees in the preferred driver position." After leaving no doubt that the result is not premised on the procedural mishap alone but would be the same whether on motion to dismiss or motion for summary judgment, it concludes (at p. 9) that "the pleadings, affidavits, and depositions raise a genuine issue of fact as to whether the Company intended to prefer white nonshareholder-employees over black and Spanish-surnamed nonshareholder-employees" and that, upon the present "record," respondents are entitled to a trial on the merits of

"this allegation of discrimination." Later (at pp. 13-14), the error and need to remand as to the union (which did not oppose the appeal) is also duly acknowledged.

Now, as in the district court and the Court of Appeals, petitioner essentially aims its arguments at absolution as a matter of law from the other claim of invidious discrimination. It does not and cannot attempt to criticize the disposition on appeal as to the union. Similarly, as to the part of the opinion concerning discrimination among nonshareholding employees, it does not challenge the holding in substance or the further proceedings in the district court required thereby. It does peripherally complain that the analysis is too limited, addressing the matter only under Title VII and leaving the applicability of Section 1981 silently at large, and that the Court of Appeals later joins in the procedural approach for which it castigates the district court, namely, consideration of matter extraneous to the pleadings. Both of these asserted shortcomings are justifiable in the traditional performance of the appellate office, but, in any event, neither silence on an additional ground when one suffices nor judicial housekeeping as to a procedural concern of this kind can gainsay the need for further proceedings in the district court or rank so high among pressing national issues as to warrant this Court's intercession in an interlocutory context.

B. Denial of Certiorari in An Interlocutory Context Is Consistent with General Practice and Is Particularly Appropriate Under the Circumstances Involved Here.

It is a commonplace that, in general, certiorari ought not to issue in an interlocutory context. For example, in *Brotherhood of Locomotive Firemen v. Bangor & Aroo-*

stook, R.R., 389 U.S. 327, 328, (1967) it was said, "Because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The circumstances involved here make adherence to that principle particularly appropriate.

1. **The Pro-Enactment Posture of the Opinion Without Final Foreclosure of Defense.**

The opinion of the Court of Appeals gives rise to no danger of precipitous ouster or frustration of Title VII or Section 1981 in any sense. To the contrary, it remands for full inquiry and determination and thus serves to expedite enforcement, if ultimately found warranted, of the wholesome legislative policy and purpose in the vital field of employment. And especially persuasive of the urgency of resolution at the earliest possible time is the fact that one whole aspect of the invidious discrimination alleged is unmistakably ripe for further proceedings in the district court now, without interference on account of concerns which touch, at best, the other claim of discrimination, which are themselves at least questionable and may disappear or alter in light of additional evidence, and which can, to the extent still viable, be raised later on appeal for more intelligent examination with the benefit of a thorough record.

On the other hand, nothing in the opinion necessarily forecloses the possibility of successful defense on further showing cognizable in law. As to both the claims of discrimination involved, the opinion expressly keeps open petitioner's opportunity to defend. As to both, it remands for all appropriate proceedings, including ultimate disposi-

tion in the district court, following which, of course, petitioner will be at liberty to appeal should the judgment prove adverse and be deemed to result from error.

2. The Harm of Delay Occasioned By This Court's Review.

Inevitably, of course, this Court's review would result in considerable delay in full litigation and potential cure of the practices complained of, including the facet of discrimination unaddressed by the petition. We respectfully submit that there should be no dearth of opportunity in the relatively near future, and on a full record in a non-interlocutory context, for such additional guidance, if any, on issues like those raised in the present petition as this Court believes to be of sufficient urgency and importance to warrant its attention. Certainly, if such guidance is ever to be undertaken in a pretrial context, prudence would seem to dictate that this occur only where, unlike here, the decision of the Court of Appeals fails to do homage to the vital policies fundamentally at stake. If nothing else of comfort to petitioner, this Court's intercession now will delay trial and thus contribute significantly to the longevity of practices which are alleged and may be found to constitute invidious employment discrimination on a classwide basis. It is not amiss, indeed, to wonder whether such delay is not at bottom the very motivation for the present petition.

C. No Similar Considerations Prevailed in Hishon.

Since the petition has been so obviously (and so fallaciously) tailored to "ride" into this Court in the wake of its action with respect to *Hishon*, it merits stress that

none of the considerations militating against intercession discussed above prevailed there. The Eleventh Circuit had totally ousted applicability of the legislation, thereby sounding the death knell of the litigation as a whole and on reasoning which, if erroneous, threatened massive defeat of the vital legislative policy. We hope to demonstrate later that the asserted kinship and conflict with *Hishon* are nothing but figments of a fertile imagination. In any event, however, it seems clear that nothing likely to be ultimately canvassed by this Court there should delay yet longer here the further proceedings in the district court unquestionably necessary on vital issues, including an aspect of invidious employment discrimination alien to anything involved in *Hishon*.

II

THE PETITION DISTORTS THE RECORD IN DEFIANCE OF THE CONTROLLING PRINCIPLES TO MAXIMIZE CHANCES OF THIS COURT'S INTERCESSION

As we shall see later, the petition does not hesitate to do distortive violence to the opinion of the Court of Appeals in order to manufacture conflicts and perils calculated to capture this Court's attention and enhance the prospect of its intercession. To be discussed now are some of the factual distortions undertaken to the same end. At every opportunity, the petition simply takes the record before the district court (which, at minimum, was subject to conflicting appraisals in various important respects) in the light most favorable to the objectives of the petition. This, of course, defies the familiar principles requiring

that, whether on review of dismissal on a motion to dismiss or on a motion for summary judgment, the record must be taken in the light most favorable to the opponent, including all reasonable inferences and constructions. (E.g., *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).)

The factual focus of the petition is on rather massive and basically meaningless details concerning the history and makeup of company ownership, all designed to give the false impression that familially motivated discrimination in *stock ownership* is the preeminent issue and to submerge the pervasive and two-faceted, racial and ethnic discrimination in *employment* revealed by the record in the required light most favorable to respondents. Although the Court of Appeals overcomes the technique to an extent sufficient for its purposes, it does so in a rather bare-bones way, which can be read as even giving too much credit to the company's assertions and which can, in any event, stand brief amplification for the sake of clarity.

A. The Nature of the System's Basic Evil.

Under the pleading and showing by respondents, denial of equal employment opportunity is the essential wrong, with exclusion from shareholding status being merely one of the implementing practices along with others, such as perpetuation of the "right of assignment" in collective bargaining agreements. To illustrate, two affiants declared, "Although I have not liked being excluded from shareholding, my main complaint is that I have not received, and do not receive, an equal opportunity to improve my position or equal pay for equal work, shareholder or not."

B. The Overall Importance of the Persistently Ignored Facet of Discrimination.

As already mentioned under heading IA above, one entire facet of the discriminatory system has persistently been ignored by petitioner, namely, the discrimination as between nonshareholding minority employees and other nonshareholding employees. At all stages, petitioner has not even bothered to address the inculpating allegations and data. The reason seems clear. That aspect of discrimination is not only telltale in its own right, but also speaks to the pervasive, racially and ethnically motivated discrimination tainting the employment system as a whole, including the disparate treatment as between the minority employees and the shareholding employees of Italian ancestry, which petitioner would have us believe results purely from historical accident and benign familial concerns.

C. The Familial Fallacy.

The plain truth is that the discrimination as among nonshareholding employees forcefully in itself refutes the familial motivation theory offered by petitioner to explain imbalances in its system. Moreover, the fact is that solicitude for "family" members cannot reasonably account for the exclusively Italian makeup of shareholders throughout the history of defendant company. The number of shareholders, originally only five in number, swelled to a peak of 208 at one point, and the practice before 1968 did not preclude permitting "friends" as well as family members from becoming shareholders. The showing submitted below significantly omits data applicable to the nearly 60 years preceding 1964, including the peak years. Even with this

lacuna, the showing reveals that "friends" have been accepted in several instances and that the friendship concept has been stretched considerably, including in one instance the nephew of a friend of a shareholder. One is left to conclude that persons of other than Italian ancestry, including fellow workers of long standing, have uniformly failed to qualify as "friends" of shareholders, or to become members of a "family" numbering in the hundreds, a circumstance hardly at variance with the discriminatory pattern and intent shown by the proof favorable to respondents.

D. The Bogus Bidding System.

Much was shown in the district court by respondents to refute the purported showing by petitioner that, except for the admitted preferment of shareholding employees out of familial solicitude, all of the more desirable jobs have for years been filled in accordance with seniority under a bidding system. Again, however, let it suffice now to recall the data discussed under heading IA1. above, which are in themselves cogent of utter disregard for seniority in the course of invidiously preferring other non-shareholding employees over those who are minority employees.

E. The Fictions Concerning the "Right of Assignment."

In the same vein, it is unacceptable that the so-called "right of assignment" reserved by the company has only been used to implement its shareholder preference plan. Obviously, it has exercised its power (under whatever appellation) for invidious preferment of other nonshareholding employees over minority nonshareholders.

No less fictional is the suggestion that the "right of assignment" finds venerable and contractual root in the company's governing documents. It achieves contractual recognition only (anomalously enough) in the collective bargaining agreements with the complicit union. It has been perpetuated by choice alone and for no other office than as a device by which to assure the ability to prefer the shareholding employees of exclusively Italian ancestry over other employees, especially minority employees, without regard to seniority or other valid and usual employment criteria.

F. The Fallacy of Especially Demanding Duties for Shareholders.

It is also untrue that the Italian shareholding employees are required to perform more demanding duties than the minority employees. Discovery elicited admissions that no skills or qualifications peculiar to the Italian shareholders are necessary to fill the better jobs.

G. The Wholesale Disparity Resulting from the Share holder Preference Plan.

Although much more might be added, the following eloquently illustrates the degree to which the shareholder preference plan has resulted in disparate treatment and impact:

In 1978, 115 of 119 shareholding employees (over 95%) actively engaged in the garbage collection occupations were classified and paid in the two highest-paying positions, head route driver or single driver. Only one shareholding employee was classified as a helper. In contrast, of the

362 nonshareholders employed in those occupations, 272 (approximately 75%) were classified and paid as helpers. Only 70 nonshareholding employees (less than 20% of their total number) were head route drivers or single drivers.

At the end of 1978, there were 38 nonshareholding employees senior to 29 shareholders. Of those 38, 36 (10 and 26, respectively) were black and Spanish-surnamed employees. Of the ten senior black persons, nine were still paid as helpers in 1978 and one as a single driver. Of the 26 Spanish-surnamed persons, 19 were paid as helpers, six as single drivers, and one as head route driver (having first obtained that position in 1978, after 21 years as a helper). In contrast, of the 29 shareholders junior to the 36 minority employees, 22 occupied the highest category of head route driver, including six shareholders employed more than ten years later than the 36 seniors.

As of April 1979, there were 145 nonshareholding employees, 43 of them black and 102 Spanish-surnamed, senior to eight shareholding employees, at least six of whom (75%) were head route drivers. Of the 145 seniors, in contrast, only one (less than 1%) was a head route driver, the aforementioned person attaining that position after 21 years as a helper. The six junior shareholding head route drivers were first hired more than ten years later than nine black and 19 Spanish-surnamed employees still paid as helpers.

All officers, managers, and foremen were shareholding employees as late as the end of 1978.

III

THERE IS NO TRUE KINSHIP WITH THE SUBJECT MATTER OF HISHON OR CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION THEREIN

Petitioner's reliance on the Eleventh Circuit's decision in *Hishon v. King & Spaulding*, 678 F.2d 1022 (11th Cir., 1982) to generate a conflict worthy of this Court's attention is clearly misplaced.

In *Hishon*, the Eleventh Circuit was called upon to determine whether a law firm, organized as a partnership, violated Title VII in its refusal to promote a female associate to partner. The employee contended that the partnership was in reality a corporation of which the partners were employees and that, therefore, partnership status was a "term, condition or privilege of employment" within the reach of Title VII.

The court rejected the contention and held Title VII inapplicable. Because the law firm in fact operated as a partnership in various ways, it could not be deemed to be a corporation. According to the court, in a partnership, as expressly distinguished from a corporation, the working partners are employers and owners, rather than employees. Crucial to the decision was the court's emphasis that "in this instance . . . the form *is* the substance." (Italics in the original.)

In other words, had the employee's contention of corporate status prevailed in *Hishon*, the court would have reached the opposite result, and correctly, since it is indisputable that Title VII applies to the employment practices

of corporations. (*Sumitomo Shoji America v. Avagliano*, ... U.S. ....., 72 L.Ed. 2d 765 (1982).)

In sharp contrast, of course, petitioner here is unquestionably a corporation, the very kind of entity properly recognized by the court in *Hishon* as subject to Title VII. The company enjoys now, and has for some 60 years enjoyed, all the benefits of corporate status under the full panoply of articles of incorporation, bylaws, and the like. Contrary to intimations in the petition, the corporation, which presently has 135 shareholders and at one time had as many as 208, is not even a close corporation under the laws of California, which limits such status to entities with no more than 35 shareholders. (*Cal. Corp. Code*, § 158(a).) It operates under a governmental franchise granted to it as a corporation. The fact is that it is a major corporate enterprise with hundreds of employees, including 500 or so performing essentially all scavenger duties for a populous county.

Thus, rather than being in conflict with the decision of the Eleventh Circuit, the present opinion of the Ninth Circuit is not only consistent with it, but is actually compelled by the pivotal distinction between corporation and partnership recognized by it. Petitioner vainly complains that the form of business entity ought not to make a determinative difference, but it forgets that, had such a distinction not been made in *Hishon*, Title VII would have been applicable there as well.

IV

NO NOVEL ISSUES CONCERNING THE APPLICATION OF TITLE VII TO STOCK OWNERSHIP ARE TRULY INVOLVED

In its effort to generate novel issues, petitioner has attempted to transform a straightforward case of employment discrimination into a question of the applicability of federal legislation to issues of stock ownership. The Ninth Circuit, however, reached no conclusion touching on such a subject in its opinion. To the contrary, the court expressly reserved decision on the issue of whether restrictions on stock ownership violate Title VII. (Appendix A to Petition, p. 13.) According to the court, the matter was strictly one of employment discrimination and, as such, clearly within the ambit of Title VII.

V

THE DECISION OF THE NINTH CIRCUIT IS CORRECT

A. Discrimination Between White and Minority Nonshareholders.

The Ninth Circuit's decision, as noted above under heading IA, holds that both Title VII and Section 1981 afford valid bases for relief on allegations of discrimination between white and minority nonshareholders. In so ruling, the court expressly recognized that the district court had erred in its summary disposition of the claim. (Appendix A to Petition, pp. 6-9.) As we have seen, petitioner does not even attempt to address in a meaningful way this aspect of the decision, conceding its validity and the consequent need for further proceedings in the district court.

B. Employment Discrimination Rather Than Stock Ownership.

As discussed under heading IV above, the Ninth Circuit's decision rests on a determination that the issue before it involved employment discrimination rather than stock ownership questions. (Appendix A to Petition, p. 10.) The court correctly pointed out (at p. 12):

> "To the extent that preferential wages, hours, and job assignments are tied to ownership of the Company's stock, the shareholder preference plan violates Title VII because the plan's effect is
>
> > to discriminate against [plaintiffs] with respect to [their] compensation, terms, conditions, or privileges of employment because of [their] race, color, . . . or national origin.
>
> 42 U.S.C. § 2000e-2(a)."

In so holding, the court noted, with unchallengeable accuracy, that section 2000e(b) of Title VII, which exempts a business entity with fewer than 15 employees from Title VII coverage, could not apply to a corporation with over 500 employees. (Appendix A to Petition, pp. 12-13.) Although petitioner argued (as it does now) that family ownership somehow exempts a business from the legislation, no such exemption was provided by Congress, and the Court of Appeals naturally refused to create one.

C. Nepotism Not a Defense.

No single authority, either cited by petitioner or otherwise known to us, has recognized that nepotism is a valid defense to allegations of discrimination under Title VII. The court's rejection of such a defense was therefore cor-

rect and fully in accord with precedent, including but hardly limited to the decisions it cited. (Appendix A to Petition, p. 11-12.)

D. Meritless Constitutional Challenges.

Petitioner's challenges to the Ninth Circuit's decision, based on alleged violations of associational and property rights, are meritless. They are tantamount to attacks on the legislation itself. The constitutionality of Title VII is beyond doubt. It is fully in accord with the tradition attributed to itself by this Court in its recent self-appraisal as a court which has "consistently repudiated" distinctions between citizens based solely on their ancestry as "odious to a free people whose institutions are founded on the doctrine of equality." (*Regents of The University of California v. Bakke*, 438 U.S. 265, 290-91, (1978).) To the extent that associational and property rights are affected by the legislation, they cannot defeat the paramount goal of equal employment opportunity embodied in Title VII.

1. The Asserted Familial Rights of Privacy and Association.

Petitioner's attempt to invoke constitutional provisions relating to family rights is entirely inapposite, factually and legally. It requires strained liberality, indeed, to consider 135 shareholders or more, obviously with differing progenitors, as a "family." In any event, of course, familial concerns are not beyond valid regulation where, as in the case of Title VII, sufficien. public interest is involved. (E.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).)

2. The Question-Begging Proprietary Rights Argument.

The attempt to invoke "liberty" and "property" provisions of the Constitution also begs the question. We need not burden this Court with the procession of authority putting beyond doubt that those provisions do not preclude reasonable regulation in the public interest, including the countless regulations affecting employment.

E. The Futile Arguments Concerning Small Businesses and Closely Held Corporations.

Petitioner's discussion of the merits of small businesses and closely held corporations and the wisdom of protecting them against undue interference are also futile as a basis for challenging the result reached by the Court of Appeals here. As noted under heading III above, this business is neither small nor closely held. In any event, the Court of Appeals does nothing more novel or adventurous in this connection than apply Title VII as unmistakably written by Congress, which has seen fit (and reasonably in view of the evil addressed) to include all employers having the required number of employees, whether their businesses be owned by one or hundreds of persons and whether they be incorporated or not. Illustrative of the wisdom of Congress in this regard is the fact that, according to the very scholar improvidently referred to by petitioner, the entities describable now or in the recent past as close corporations include Ford Motor Company and Hallmark. (O'Neal, *Close Corporations* (1970 ed., supplemented 1982) § 1.03, p. 7.)

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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